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IN THE

Supreme Court of the United States

October Term, 1952

No. 158

SAMUEL OCHS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Samuel Ochs prays that a writ of certiorari issue to review the order (R. 23) of the United States Court of Appeals for the Second Circuit affirming the decision of The Tax Court of the United States which sustained the asserted deficiency of $377.26 in income tax for the year 1946.[1]

Opinions Below

The findings of fact and opinion of The Tax Court written by Judge Black are reported in 17 T.C. 130 (R. 2-9). Judges Kern and Raum dissented without opinion.

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[1] $328 of the deficiency arises from the sole issue tried. The $49.26 balance, attributable to another item, was not contested.

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The opinions of the Court of Appeals are reported in 193 F. (2d) 692 (R. 11-22). Judge Augustus N. Hand wrote the Court's opinion with Judge Chase joining. Judge Frank filed a detailed dissenting opinion.

Jurisdiction

The final order of the Court of Appeals was entered March 27, 1952 (R. 23). This petition is filed June 25, 1952. The jurisdiction of this case is invoked under 28 USC, Section 1254(1).

Question Presented

When taxpayer's primary purpose in sending his children to boarding school, who otherwise on reaching age would attend public school, was to follow the doctor's advice that such separation from their mother was essential to alleviate and improve her painful voice condition, high nervousness and irritation resulting from a throat cancer operation and to prevent fatal recurrence of cancer, is such boarding school cost a deductible expense for "medical care" of the wife, as broadly defined in Section 23(x) of the Internal Revenue Code?[2]

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[2] This issue raises the following questions: Did Congress intend "medical care" to be broadly or narrowly construed? Does "medical care" cover only what the average layman thinks of, or does it also include other treatments modern medical science prescribes? Are only expenses *directly to* the sick person deductible, or are expenses incurred, on medical advice, for indirect treatments primarily for the cure of the sick person also included? Can some items, which normally are non-deductible living expenses, be deductible medical expenses when incurred only because the doctor advises them as essential to cure a seriously sick person? What tests and lines should be made so that layman, doctor and revenue agent will know what are allowable medical expenses?

Statutes and Regulations Involved

The pertinent tax sections, Treasury Regulations and legislative history is set forth in the Appendix, *infra*. Briefly, Section 23(x) of the Internal Revenue Code allows an individual to deduct his unreimbursed expenses, over 5% of his adjusted gross income, with certain maximums, for medical care of himself, spouse and dependents. "Medical care" is defined to "include amounts paid for the diagnosis, cure, mitigation, treatment or prevention of disease, or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance)."

Statement of Case

In December 1943 taxpayer's wife was operated on for cancer of the throat (R. 4). Thereafter she underwent extensive X-ray treatments (R. 4). The operation and treatments left her barely able to whisper (R. 4). Having found multiple metastases, the doctors would not know for five years whether cancer would reappear (R. 4, 5).

Taxpayer in early 1946 became alarmed at his wife's condition (R. 4). Her voice had not improved as it should (R. 4). She had two healthy daughters then under four and six years of age (R. 4). Her efforts to speak or whisper to them were painful, required much of her strength and left her in a highly nervous state (R. 4). The taxpayer and his wife consulted a reputable physician who advised that if the children were not separated from their mother she would not improve and her nervousness and irritation might cause recurrence of cancer (R. 4).

Acting on the doctor's advice taxpayer managed to maintain the two children in a day school during the first half of 1946 and thereafter in a boarding school (R. 4). This cost him $1,456.50 in 1946 (R. 4). Taxpayer's income was about $5,000 or $6,000 a year (R. 5).

While the children were away the wife's condition gradually improved and in time she recovered the use of her voice (R. 5).

In December 1948 the doctors could find no recurrence of cancer and she was considered fully cured (R. 5). The children immediately returned home and thereafter always attended public school (R. 5). At times during 1946 the wife worked as a typist, but with her voice condition she could not hold a position and was able to do only part time work (R. 5).

Taxpayer deducted on his 1946 income tax return as "medical care" expenses the $1,456.50 he spent in 1946 maintaining his children in school (R. 3). The Courts below sustained the Commissioner's disallowance of the deduction.

The Tax Court found as a fact that the taxpayer's purpose in sending the children away during 1946 was to alleviate his wife's pain and suffering in caring for the children by reason of her inability to speak above a whisper and to prevent a recurrence of the cancer which was responsible for the condition of her voice (R. 5).

The Reasons for Granting Writ

1. In legal principle the decision of the Court below is in direct conflict with *Commissioner* v. *Stringham,* 183 F. (2d) 579 (C.A. 6th), affirming 12 T.C. 580 (1949). There

the taxpayer in Ohio sent his small daughter, who suffered from bronchitis, to boarding school in sunny Arizona. The travel and school expenses, except that attributed to her education, were allowed as a "medical expense" deduction.

That here the healthy children were sent away is an immaterial distinction. In both the *Stringham* and this case the boarding school expense was incurred "primarily for the prevention or alleviation of a physical or mental defect or illness". This sole test in Treasury Regulations 111, Sec. 29.23 (x)-1 is one of purpose and motive determined in light of the medical advice given, the nature of the expense in relation to the seriousness of the disease, the taxpayer's normal mode of living and the reasonableness of the expense. Neither statute nor regulation require the expense be spent *directly on* the ill person. "Primarily for" is not synonymous with "directly on". Congress certainly did not intend to deny deductions for the proven indirect therapeutic techniques of modern medical science.

Admittedly if the wife had been sent to a sanitarium, the cost would have been deductible. Taxpayer's cheaper remedy, which he could barely afford, of sending the children away on the doctor's advice to save his wife should, like *Stringham's* expense, be deductible.

2. The Court below completely disregarded the most essential fact the Tax Court found: that taxpayer's purpose in sending the children away was to alleviate his wife's pain and to prevent a recurrence of the cancer. This purpose was based on the doctor's advice. With his wife's life at stake no reasonable man could have any other more dominant purpose. Any additional motive, such as the benefit of boarding school for the children, could be only

incidental. The Treasury Regulations require that deductibility be determined by the primary, and not a secondary purpose.

The Court of Appeals, contrary to this express ultimate finding of fact, concluded the expense was incurred because taxpayer lost his wife's services in caring for the children and while the wife was acting as a typist to earn family money. The primary purpose of the expense was to prevent cancer recurring and not to hire a substitute to care for the children. To infer, as the Court below does, that the children were sent away so the wife could work, when her illness prevented holding even part time positions, illustrates the weakness of the Court's unwarranted conclusions.

The rule is well established that where the Tax Court has made an express finding of fact based on substantial evidence, the reviewing court must accept it. Contrary or different conclusions based on the circuit court's own inferences from the record have not been sanctioned by this Court.

3. The proper construction of "medical expense" is vital to every American family. Cancer now strikes one out of every five people in the United States annually. When cancer, rheumatic fever, polio, cerebral palsy or mental illness occur, medical expense immediately becomes the largest item in the family budget.

This case illustrates the narrow interpretation the Commissioner and the Courts have given the term "medical care". The psychiatrist today treating the mentally ill child frequently works primarily on the parents. The polio child often must be enrolled in a swimming club which others join for pleasure. Modern medicine has many new and indirect techniques for treating the ill.

Only a restricted construction, such as adopted in this case, bars such expenses from the term "medical care". The Commissioner and the courts should not lag behind medical progress.

In enacting Section 23(x) Congress was adding a little simple humanity into the tax law. It recognized "the desirability of maintaining the present high level of public health and morale", and therefore "the term 'medical care' is broadly defined". Sen. Rep. 1631, 77th Cong., 2nd Sess. (1942) (p. 95-96). The failure of the Courts below to follow the liberal construction desired by Congress is epitomized in Judge Frank's dissenting opinion:

> "• • • But there is no good reason why, when for once, Congress, although seeking revenue, shows it has a heart, the courts should try to make it beat feebly."

Medical expenses are too vital to every taxpayer to remain in the confused hit-and-miss state they are today. Doctors' fees and hospital charges are generally allowed. But expenses for preventing disease or for recuperating have a harder struggle. Fees paid a Christian Science practitioner or a psychoanalyst are ruled deductible, but the cost of installing a stair seat elevator (which adds no value to the home) to prevent further heart attacks, is deemed non-deductible. See Bureau rulings, 1943 CCH Fed. Tax Ser. par. 6175 and 1952 CCH Fed. Tax. Ser. par. 6113. A trained nurse for the sick wife is allowed, but the cheaper practical nurse or temporary helper, advised as essential by the doctor to run the house while the wife is sick or recuperating, is disallowed. Today the revenue agent's own medical notions and feelings determine

whether what the desperate parent did on doctor's advice is really a medical necessity or is just an expense incurred for better living.

The Court below, unlike the Court in the *Stringham* case, *supra,* apparently thought that since schooling cost is normally a non-deductible living expense, it could never be a deductible medical expense. With his small income taxpayer certainly would not have sent his children to boarding school except as the necessary means for curing his wife. The expense was not made merely to aid the general health or recuperation of the wife. It was primarily to prevent recurrence of the dreaded cancer.

The Court below refused to draw lines or state tests in fear that it would open the floodgates to living expenses and vacation trips passing as medical expense. It failed to see that behind the impassable wall it erected are the deserving taxpayers to whom deduction of the expense means taking or not taking the medical treatment the doctor advises is necessary.

Lines and tests can and should be made which would open the feared floodgates to the deserving and still hold back those who would abuse the medical expense deduction. Judge Frank in his dissenting opinion pointed out what he thought should be some of the guiding principles. But their very existence in a dissenting opinion subjects them now to rejection by revenue agents. The motive of the taxpayer, the doctor's advice, the seriousness of the illness, the taxpayer's usual mode of living, the proximity of the expense to the illness, the choices the taxpayer has and the reasonableness of the expense, are some of the tests this Court may deem pertinent.

The time is ripe for this Court to lay down for the guidance of both taxpayers, doctors and the taxing authorities the proper tests for the allowance and the disallowance of medical expenses. With the rights of so many ordinary taxpayers at stake, this problem should no longer simmer in uncertainty. Medical expenses are too closely entwined with humanity and suffering and true charity to await the possibility that the various Courts of Appeal will clarify the proper rules.

This Court's enlightenment on this problem to the whole public is vital and timely. Here is presented a simple story of what happens when cancer strikes the average American family. It deserves this Court's deep consideration, not merely because of the plight of the petitioner but with the hope that in the future the struggles of other families may be alleviated.

Conclusion

For the foregoing reasons it is urged that this petition for a writ of certiorari should be granted.

June 25, 1952.

Respectfuly submitted

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APPENDIX A

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(x) [as added by Sec. 127(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, and amended by Sec. 8(c) of the Individual Income Tax Act of 1944, c. 210, 58 Stat. 231] *Medical, Dental, Etc., Expenses.*—Expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse, or a dependent specified in section 25(b)(3), to the extent that such expenses exceed 5 per centum of the adjusted gross income. If only one exemption is allowed under section 25(b) for the taxable year the maximum deduction for the taxable year shall be not in excess of $1,250. If more than one exemption is so allowed, the maximum deduction shall not be in excess of $2,500. The term "medical care", as used in this subsection, shall include amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance).

* * * * *

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) [as amended by Sec. 127(b) of the Revenue Act of 1942, *supra*] Personal, living, or family ex-

penses, except extraordinary medical expenses deductible under section 23(x);

• • • • •

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.23(x) (1). *Medical, Dental, Etc., Expenses.*— • • •

• • • • •

The term "medical care" as used in this section and in section 23(x) includes amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance). • • • Allowable deductions under section 23(x) will be confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness. Thus, payments for expenses for hospital, nursing (including nurses' board where paid by the taxpayer), medical, laboratory, surgical, dental and other diagnostic and healing services, for drugs and medical and dental supplies (including artificial teeth or limbs), and for ambulance hire and travel primarily for and essential to the rendition of medical services or to the prevention or alleviation of a physical or mental defect or illness, are deductible.

• • • • •

Legislative History

S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 95-96 (1942-2 Cum. Bull. 504, 508, 576-577):

The committee bill allows, within prescribed limits, the deduction of expenses for the medical care of the taxpayer, his wife, and his dependents. Th term "medical care" is broadly defined and in-

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Although a deduction is denied with respect to such expenses as are compensated for by insurance or otherwise, amounts paid for accident or health insurance are included in the category of medical expenses. Payments for hospitalization insurance or for membership in an association furnishing co-operative or so-called free-choice medical service, or group hospitalization and clinical care are intended, for purposes of this section, to be included as amounts which may be deducted.

Section 24(a), relating to items not deductible, is amended by Section 127 to conform to section 23(x), and a technical amendment is made to section 23(o) to provide that, in computing net income for purposes of the deduction for charitable and other contributions, the deduction of medical expenses shall not apply. Finally, section 22(b)(5) is amended to include in gross income amounts received for compensation for personal injuries or sickness which are attributable to and not in excess of deductions allowed under section 23(x) in any prior taxable year (1942-2 C. B. 576-577).